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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, et al.,

Petitioners

vs.

JAMES THOMAS AND OSCAR CASTILLO,

Respondents

On Petition for a Writ of Certiorari to the Court of Appeals State of Arizona Division Two

PETITION FOR A WRIT OF CERTIORARI

Leroy W. Hofmann
HOFMANN, SALCITO & STEVENS
302 E. Coronado
Phoenix, Arizona 85004-1524

Counsel of Record

Robert Andy Rojas
Benjamin R. Miranda
5800 W. Glenn Drive
Suite 300
Glendale, Az 85301
(602) 934-9655
Attorney for Petitioners

30 pp

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Robert Andy Rojas
Benjamin R. Miranda
5800 W. Glenn Drive
Suite 300
Glendale, Az 85301
(602) 934-9655
Attorney for Petitioners

QUESTION PRESENTED

In a 42 U.S.C. 1983 claim, are Defendants entitled to qualified immunity when evidence shows that they lied in their application for a search warrant?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, et al.,

Petitioners

vs.

JAMES THOMAS AND OSCAR CASTILLO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Mr. and Mrs. Hernandez (et al.) respectfully petition for a Writ of Certiorari to review the judgement of the Court of Appeals State of Arizona, Division Two.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Arizona Division Two of September 27, 1994 is unreported. (App. 1-15) The Supreme Court of Arizona denied review on May 25, 1995.

JURISDICTION

The Court of Appeals entered its judgement on September 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a)

The Supreme Court of Arizona denied a Petition for Review on May 25, 1995.

The issue of qualified immunity was raised by Defendants in a Motion for Summary Judgement prior to trial. After Motion and Oral Argument, the Motion was denied.

After presentation of Plaintiff's case in chief, Defendant moved for directed verdict, said motion was denied. The matter had proceeded to trial a second time after the jury could not reach a verdict on the 28 U.S.C., 1983 civil rights complaint.

The jury returned a verdict in favor of Plaintiffs and Defendants appealed to the Court of Appeals for the State of

Arizona Division One.

The matter was transferred to Division Two of the Court of Appeals of the State of Arizona upon motion by Division One.

STATUTORY PROVISION INVOLVED

42 U.S.C. 1983

STATEMENT

This lawsuit was filed by Plaintiffs Gladys, Celedonio, Antonio, Jesus, and Samuel Hernandez (hereinafter "Plaintiffs") against the City of Phoenix and certain members of the Phoenix Police department under 42 U.S.C. 1983 and Arizona Common Law. The claims of Plaintiffs arise from Defendants' inadequate investigation, application for a search warrant and subsequent execution of same on the Hernandez family's home in the early morning hours of December 5, 1989.

Plaintiffs filed this civil action

September 23, 1991, naming as Defendants the City of Phoenix, its Police Department, Police Chief Ruben Ortega, R.D. Tyler, Eric Reed, J. Blasko, J. Garza, G. Gibbons, K. Knudsen, E. Mukati, K. Noyd, V. Piano, R. Welton, M. Geske, O. Castillo and J. Thomas. The complaint asserted claims under 42 U.S.C. 1983 (and other civil rights statues), assault and battery, false arrest, false imprisonment, and gross negligence.

On November 16, 1992, Defendants moved for partial summary judgment based on the officers' claim to entitlement of qualified immunity. Both sides filed voluminous briefs, which were fully considered by the Court. The Court denied Defendants' motion citing evidence that false information had been given in the issuance of the warrant by Defendant and that exculpatory evidence had been intentionally withheld. Defendants did

not request a written summary of the Courts findings nor file a motion for reconsideration.

On February 8, 1993, trial began. Defendants' motion for a directed verdict on the issue of Section 1983 liability and qualified immunity was denied. On February 12, 1993, the jury returned a verdict in favor of Defendants on the State claims and no verdict on Plaintiffs' section 1983 claims against Defendants Castillo and Thomas which were based on the intentional misrepresentation and suppression of exculpatory evidence in their application for the search warrant. A mistrial was declared on the Section 1983 claims as to Defendants Thomas and Castillo.

A second trial began March 15, 1993, alleging Section 1983 violations against Defendants Castillo and Thomas based on the their defective application for a

search warrant. The Court appropriately did not allow reference to the prior trial, which could be adequate grounds for a mistrial. Evidence regarding the execution of the search warrant was allowed for the sole purpose of ascertaining Plaintiffs' damages, a fact the Court made abundantly clear to all.

At the close of Plaintiffs' case-in-chief in the second trial, Defendants Castillo and Thomas again moved for a directed verdict in their favor alleging entitlement to qualified immunity from any Section 1983 liability. Plaintiffs', counsel again referred the Court to the evidence which demonstrated reckless and/or the intentional manner in which supposedly incriminating evidence was misrepresented and exculpatory evidence suppressed in Defendants' application for the warrant. The motion was denied by the Court after a full opportunity for

argument. Despite Defendants' advocation throughout the pretrial that the determination of qualified immunity was for the Court only, and after their summary judgment and directed verdict motions were denied, Defendants still sought such a determination from the jury through a maze of legalistic interrogatories. The Court denied use of such a format.

On March 18, 1993, the jury returned its verdict in favor of the Plaintiffs in the amount of $ 17,500.00 Plaintiffs' subsequent motion for attorney's fees in the amount of $ 45,605.00 and cost of $ 6,210.46 was granted in it entirety. (Minute Entry Order dated June 17, 1993). Judgment was thereafter entered on August 5, 1993. A Motion for New Trial/JNOV was subsequently denied. Defendants Thomas and Castillo thereafter filed their Notice of Appeal on October 11, 1993.

REASONS FOR GRANTING THE PETITION

The Trial Court correctly considered the qualified immunity issues on Defendants' Motion for Summary Judgement. The affidavit to the search warrant contained the following false statements:

1. We know that on 11-20-89 Jose Soto received at least 1 Kilo of cocaine.

2. We know from servaillance that Ramon Ochoa delivered cocaine to Jose Soto on 11-21-89 at 21 E. Southgate.

3. We know Jose Soto is a resident of 21 E. Southgate.

4. U.S. West records indicate Jose Soto was a subscriber to the telephone used at 21 E. Southgate.

Plaintiffs presented evidence that each of the above statements were untrue and unsubstantial. The Court considered Defendants' misrepresentation of the facts and their refusal to provide the subscriber information. The Court

determined that qualified immunity was not appropriate because of the lack of good faith and the fact that one warrant for the search of single family home was being used to search two separate homes.

The lower Court of Appeals relied on the facts as alleged by the Defendants including the allegation that they were unaware of the existence of two homes on the lot and that U.S. West did not indicate two residences. The lower Appellate Court held that the appropriate standard for review is as follows:

> "we will affirm the trial courts denial of a claim of Qualified Immunity by Government Defendants if, even under the Defendants version of the facts, their conduct violated law that was clearly established at the time "(Memorandum Decision of the Court of Appeals, Page 6.)"

The lower Court of Appeals has misinterpreted the holding in Mitchell v. Forsyth 472 U.S. 539, 105 5. Ct 2806, 86 L.Ed 2d 411 (1985). In that case the

court stated

> In cases where the District Court has denied Summary Judgement for Defendant on the ground that even under Defendants version of the facts the Defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the Defendant claims he took, Mitchell v. Forsyth Supra at 2816.

The footnote points out specifically the issue that is appealable is a purely legal one. Whether the facts alleged (by Plaintiff, or in some cases, the Defendant) support a claim of violation of clearly established law, Mitchelle v. Forsyth Supra at 2816 Footnote 9 emphasis added. Clearly, if the Defendants version of the facts indicate a violation of clearly established law, the issue of qualified immunity is simplified for the Courts review. However, in cases where the facts are disputed and evidence is produced that the Defendants misrepresented the facts in the affidavit

for the search warrant, the Plaintiffs' version of the facts should be considered.

The trial judge determined the Defendants did not act in good faith and denied the motions for Summary Judgement and Directed Verdicts. The jury determined that Defendants did in fact violate Plaintiffs constitutional rights.

The trial courts findings that the Affiant deliberately included misstatements of law or excluded material facts in a factual determination is to be upheld unless clearly erroneous. State v. Buccini 167 Ariz 550, 554 810 P 2.d 178,182 (Ariz. 1991)

When an affidavit that was submitted to a magistrate is later found to have been supported by false statements, the trial court must conduct an independent review of the effects of the false statements on probable cause because "the question turns on the consequence of a

fraud on the issuing magistrate which the magistrate was not in a position to evaluate. State v. Buccini 167 Ariz 555-556, 810 P 2d at 183-184.

Although the Appellate Court must conduct a De Novo Review because of the mixed question of law and facts, the Appellate Court must exercise its independent judgement measuring the facts, as found by the trier, against the constitutional standard of reasonableness. State v. Buccini 167 Ariz 556, 810 P 2d. at 184. (Emphasis added)

The Buccini Court went on to emphasize that when the earlier finding of probable cause was based on a set of facts, some of which are shown to be false, no reason exist to give deference to the earlier finding. When a court reassess a search warrant affidavit, a "Doubtful or marginal case should be resolved in Defendants favor, (In this

case the Plaintiffs in the civil matter, Defendant in criminal matters). It is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment. State v. Buccini ID.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Leroy W. Hofmann
HOFMANN, SALCITO & STEVENS
302 E. Coronado
Phoenix, Arizona 85004-1524

Robert Andy Rojas
5800 W. Glenn Drive, Ste. # 300
Glendale, Arizona 85301

Benjamin R. Miranda
5800 W. Glenn Drive, Ste. # 300
Glendale, Arizona 85301

APPENDIX

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

GLADYS HERNANDEZ, CELEDONEO HERNANDEZ, individually, as husband and wife and as parents and next friends of ANTONIO HERNANDEZ, JESUS HERNANDEZ and SAMUEL HERNANDEZ, minor children,	2 CA-CV 94-0131 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28 (a) (2) Rules of Civil Appellate Procedure
Plaintiffs/Appellees	
v.	
JAMES THOMAS and OSCAR CASTILLO,	
Defendants/Appellants	

APPEAL FROM THE SUPERIOR COURT OF

MARICOPA COUNTY

Cause No. CV 91-22341

Honorable Marilyn A. Riddel, Judge

REVERSED

Robert Andy Rojas Glendale

Attorney for Plaintiffs/Appellees

Jones, Skelton & Hochuli
by John T. Masterson Phoenix
and David C. Lewis

Attorney for Defendants/Appellants

E S P I N O S A, Presiding Judge.

Defendants/appellants Oscar Castillo and James Thomas detectives with the Phoenix Police Department, appeal from a jury verdict in favor of plaintiffs/appellees Gladys and Celedoneo Hernandez (the Hernandezes) on their 42 U.S.C. 1983 claim based on a search of their home pursuant to a warrant. Castillo and Thomas contend that the trial court erred in denying their motion for directed verdict because there was probable cause to support their search warrant and they were entitled to qualified immunity. We agree and reverse.

Factual and Procedural Background

As part of a large-scale narcotics trafficking investigation, Phoenix police obtained a judicial wire tap order authorizing the monitoring of telephone calls of a suspected drug dealer, Elpidio Duran. monitored conversation led police to investigate Enrique Castillo,1 who in turn, led them to Jose Soto, a tenant of the Hernandezes. Police were unaware that Soto rented a guest house not visible from the street on the same lot behind the Hernandezes' home and that he shared the 21 East Southgate address. Through the wire tap, police were able to ascertain the number of the telephone Soto was using. Information obtained from U.S. West Communications showed that phone number belonged to Soto at the service address of 21 East Southgate, but did not indicate multiple dwellings at the address. Police never saw nor attempted to obtain an actual telephone bill, which

would have revealed that Soto's phone number was assigned to the rear structure, nor did they check county property

---

1 Because appellant Castillo and Enrique Castillo share the same last name, we will refer to Enrique Castillo by his alias, Cachettes.

records, which would have indicated multiple residences on the property.

Between Novmeber 18 and November 24, 1989 police intercepted eleven conversations between Soto and Cachettes arranging the purchase of various quantities of cocaine. At least six of these calls originated from 21 East Southgate, where he parked his car, spoke with someone in the front yard, and then crossed the street with his briefcase where he met Soto at 20 East Southgate. During a November 21 phone conversation, Soto gave Cachettes instructions to deliver cocaine to him. A surveillance officer followed Cachettes's delivery man

to the vicinity of 21 East Southgate and lost sight of him in an alley behind the house. The delivery man's car was latter seen parked in the alley between 21 East Southgate and the house next door. The surveillance officer did not notice that there were two structures on the property because it was dark and his view was obstructed by some bushes; however, he later returned to the area to see if he could determine exactly where the delivery man had gone and noticed the second structure. The next day Soto called Cachettes from 21 East Southgate to inform him that Soto had the cocaine.

Using this information, Castillo and Thomas secured a search warrant for 21 East Southgate as part of a larger search operation involving twenty-two other locations. On December 5, Phoenix police officers entered the Hernandez home to execute the warrant. The warrrant listed

the location to be searched as "21 East Southgate, single family residence of block construction, white in color, front door fences north, driveway on the east side. The house is the third structure east of Central and on the south of Southgate." The warrant did not refer to any separate structures on the property.[2] No contraband was found in the Hernandezes' home, but police discovered approximately 260 pounds of marijuana and $ 50,700.00 in cash in the guest house. No cocaine was found.

The Hernandezes sued the City of Phoenix, the Phoenix Police Department, the chief of police, and thirteen officers, including Castillo and Thomas, in their official and individual capacities, asserting that their federal civil rights had been violated under 1983 and raising state claims for assault and battery, false arrest, false imprisonment,

negligence, gross negligence, and

---

2 While there was testimony that the police were aware of the separate structure prior to the execution of the warrant, contrary to appellees' assertions, there is no evidence that they were aware the structures were separate residences.

emotional distress. In their 1983 claim against Castillo and Thomas, the Hernandezes alleged that the officers secured the warrant "without confirming or investigation the actual location of Jose Soto's residence."

Castillo and Thomas moved for summary judgement on the civil rights violation on grounds they had acted in good faith pursuant to a search warrant supported by probable cause and were immune from civil liability because they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The trial court denied the motion. The matter

proceeded to trial and the claims for assault and battery, false arrest, false imprisonment, and negligence were dismissed, as were some of the defendants. The jury returned defense verdicts on all claims, except the 1983 claim against Castillo and Thomas, which resulted in a hung jury and a mistrial.

The matter proceeded to trial a second time. At the close of the Hernandezes' case, Castillo and Thomas moved for a directed verdict, reasserting the arguments they had advanced in their summary judgment motion. The trial court denied the motion. The trial court denied the motion , and the jury found in favor of the Hernandezes. The trial court later denied Castillo and Thomas's motion for judgment notwithstanding the verdict.

Standard of Review

Castillo and Thomas asserted a qualified immunity claim in their motions

for summary judgment, directed verdict, and judgment notwithstanding the verdict and raise the trial court's denial of these motions as reversible error. The Hernandezes contend that the standard of review is one of deference to the trial court's discretion. We distinct form the merits of the case. **Hunter v. Bryant**, 502 U.S. 224, 112 S. Ct 534, 116 l. Ed. 2d 589 (1991). We will affirm the trial court's denial of a claim of qualified immunity by government defendants if, even under the defendants' version of the facts, their conduct violated law that was clearly established at the time. **Mitchell v. Forsyth**, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); **Henke v. Superior Court**, 161 Ariz. 96, 775 P. 2d 1160 (App. 1989). On questions of law, our review is de novo. **City of Phoenix v. Superior Court**, 170 Ariz. Adv. Rep. 68 (Ct. App. August 4, 1994).

Qualified Immunity

The doctrine of qualified immunity shields government officials performing discretionary functions from civil liability so long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. **Anderson v. Creighton**, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Castillo and Thomas are not entitled to immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." **Malley v. Briggs**, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986). The shield of immunity is lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official

belief in its existence unreasonable." Id. at 344-45, 106 S. Ct. at 1098, 89 L. Ed. 2d at 281.

In denying the motion for directed verdict, the court stated, "As a trial judge, every time I hear reasonable, they should have done it, that's for a jury to determine." However, the reasonableness of Castillo's and Thomas's actions and whether they were entitled to qualified immunity was a matter of law for the trial court to decide, not an issue of fact for the jury. **Hunter v. Bryant, supra.** In that case, the Supreme Court overruled a Ninth Circuit decision, which held that whether a reasonable officer could have believed he had probable cause was a question for the trier of fact and that summary judgment based on a lack of probable cause is proper only if there is but one reasonable conclusion a jury could reach. The Court rejected that approach,

finding the question of immunity one for the trial court, not the jury. The Court ruled that the trial court "should ask whether the [defendants] acted reasonably under settlement law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed. . . after the fact." Hunter, 502 U.S. at ___, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (emphasis added).

Castillo and Thomas argued that reasonable officers could have believed that the description in the search warrant affidavit was constitutionally adequate. Probable cause to issue a warrant exists "when the facts and circumstances presented to the magistrate are based on personal knowledge or trustworthy information sufficient to warrant a person of reasonable caution to believe that seizable items are located on the premises

to be searched." State v. McCall, 139 Ariz. 147, 156, 677 P. 2d 920, 929 (1983), cet. denied, 467 U.S. 1220 (1984). Assessment of the validity of a warrant must be based on information that the officers disclosed or had a duty to discover and disclose to the issuing judge. Maryland v. Garrison, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). Evidence that emerges after a warrant is issued has no bearing on whether or not it was validly issued. Id.

The Hernandezes generally repeatedly contend that Castillo and Thomas "lied" and withheld significant information in securing the warrant. More specifically, they assert that the officers conducted no investigation to determine Soto's residence or the occupants of 21 East Southgate, nor did they surveil the address. The assertions are not supported by the record. As a result of a valid

wire tap of Cachettes's phone, police successfully procured a "tap and trace" on the phone Soto was using. Information obtained from the telephone company showed that the number belonged to Soto at 21 East Southgate, not "21 East Southgate rear." Although the Hernandezes' expert testified that his review of police records showed that no surveillance was initiated at 21 East Southgate, Officer Nordlin testified that he followed Cachettes's delivery man to the vicinity and saw his car parked behind the house. A subsequent phone call from Soto to Cachettes, originating from the same number at 21 East Southgate, confirmed the delivery of the cocaine. The officers' knowledge that Soto maintained addresses across the street at 20 East Southgate and nearby on West Riverside and their failure to include this information in the search warrrant affidavit does not negate the

probability that contraband could be found at 21 East Southgate.

Detective Thomas testified that someone was sent to 21 East Southgate before the warrant was executed to see what was located there. That he was unable to remember who was sent or what happened to notes describing the property is irrelevant to the validity of the warrant. Furthermore, a visual inspection of the front of the house in order to secure a description would not have revealed the existence of a separate residence in the back because it was not visible from the front. While it is apparent with the benefit of hindsight that "more diligent investigation" would have revealed that Soto occupied only the rear structure, on the facts that Castillo and Thomas possessed at the time they swore out the affidavits to secure the warrant, probable cause existed to search

the premises. Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter, 502 U.S. at __, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (quoting Malley, 475 U.S. at 343, 341, 106 S. Ct. at 1097, 1096, 89 L. Ed. 2d at 280, 278). If officials of reasonable competence could disagree on a course of conduct, that conduct should be protected. Malley, supra. Here, on an objective basis, reasonably competent officers would conclude that a warrant should issue, or at best, officers of reasonable competence could disagree on this issue, thus, Castillo and Thomas are entitled to qualified immunity.

The trial court's judgment in favor of the Hernandezes is reversed. As the Hernandezes are no longer prevailing parties, the award of attorney's fees and

costs is vacated. 42 U.S.C. 1988 (b).

SUPREME COURT

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 W. WASHINGTON
PHOENIX, ARIZONA 85007-3329
TELEPHONE: (602) 542-9396

May 25, 1995

RE: GLADYS HERNANDEZ et vir/ANTONIO HERNANDEZ et al vs. JAMES THOMAS/OSCAR CASTILLO
Supreme Court No. CV-94-0574-PR
Court of Appeals No. 2 CA-CV 94-0131
Maricopa County No. CV 91-22341

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 23, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 25th day of May, 1995.

NOEL K. DESSAINT, Clerk

TO:

Robert Andy Rojas, Esq.
John T. Masterson, Esq. and David C. Lewis, Esq., Jones, Skelton, & Hochuli
Joyce Goldsmith, Clerk Court of Appeals, Division Two, Tucson Mead Data Central
West Publishing Company

Supreme Court, U.S.
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No. 95-485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, *et al.*,
Petitioners,

v.

JAMES THOMAS and OSCAR CASTILLO,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals, Division Two

---

RESPONDENTS' BRIEF IN OPPOSITION

JOHN T. MASTERSON
DAVID C. LEWIS
Counsel of Record
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Attorneys for Respondents Thomas and Castillo

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where the objective facts available to police officers applying for a search warrant suggest no distinction between a single and multiple-family residence, are the officers entitled to qualified immunity for their objectively reasonable, albeit factually mistaken, warrant application?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-485

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, *et al.*,
Petitioners,

v.

JAMES THOMAS and OSCAR CASTILLO,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals, Division Two

---

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents James Thomas and Oscar Castillo respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Arizona Court of Appeals' Memorandum Decision dated September 27, 1994.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this action provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

U.S. Const. 4th amend.

COUNTERSTATEMENT OF THE CASE

On December 5, 1989, police officers from the City of Phoenix (other than Respondents Castillo and Thomas) executed a search warrant at 21 East Southgate, Phoenix, Arizona, which police believed to be the residence of a suspected drug dealer, Jose Soto. As it turned out, the address known as 21 East Southgate contained both a front house occupied by the Hernandez family, as well as a rear structure occupied by the Hernandez' tenant, Jose Soto.

A. Search Warrant Application

In October of 1989, Phoenix police began a narcotics investigation involving Elpidio Duran. (Tr. 3/15/93 at 79, 82).[1] Based on information identifying Mr. Duran as a large-scale drug dealer, Phoenix police, together with the Maricopa County Attorney's Office, applied for a wire tap to monitor Mr. Duran's telephone calls. (*Id.* at 82, 84).

To obtain a wire tap order, the police officers sought a pin register by going to the telephone company with a subpoena and obtaining the identity of a subscriber on a particular telephone. (*Id.* at 83).[2]

---

[1] All references to the trial transcript shall be designated at "Tr. ——." If certiorari is granted, these excerpts of trial testimony will be included in the Joint Appendix. The only items included in the Appendix to this Brief are: (1) the Arizona Court of Appeals' Memorandum Decision; and (2) excerpts of the 105-page search warrant.

[2] Together with a prosecutor from the Maricopa County Attorney's Office, the "wire affidavit" is submitted to a Superior Court judge who determines whether there is sufficient information to justify the wire tap order. (*Id.* at 83-84). If the judge determines

After several weeks monitoring the telephone calls of Elpidio Duran, Respondent Castillo came to suspect Enrique Castillo (aka Mr. Cachettes) as another suspect in the drug operation. (*Id.* at 87). Once Respondent Castillo became aware that Cachettes was intimately involved in the drug operation, he also became aware that Jose Soto was involved. (*Id.* at 87).

Between October 12, 1989 and December 5, 1989, Phoenix police officers recognized Jose Soto's voice on eleven telephone calls, six of which were identified as coming from 21 East Southgate. (Tr. 3/17/93 at 77-79).[3] Among those six telephone calls were the following:

- On November 11, 1989, police monitored a telephone call during which Jose Soto advised Enrique Castillo that he had several pounds of marijuana for sale and $750 in his possession, and that he offered this to Mr. Castillo in exchange for cocaine. (*Id.* at 89).
- On November 19, 1989, officers also listened to a telephone call between Soto and Castillo during which Castillo told Soto that he had customers in need of four kilos of cocaine. (*Id.* at 89-90).
- On November 19, 1989, police monitored a telephone call during which Jose Soto inquired of Enrique Castillo if any cocaine was available. (Tr. 3/15/93 at 94).

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there is sufficient evidence justifying the wire tap, he issues an order allowing police to listen to telephone conversations of the particlular suspect. (*Id.* at 83). The police thereafter take the order to the local telephone company which then connects the telephone lines for the police. (*Id.* at 84).

[3] The relevant portions of the 105-page search warrant and search warrant affidavit are attached to this Brief as Appendix "B." Officer Castillo listened to tapes of the telephone calls between October 12, 1989 and December 5, 1989, and could recognize Soto's voice on at least 11 telephone calls. Tr. 3/17/93 at 77-78.

- On November 19, 1989, police monitored a telephone call wherein Jose Soto stated that he needed three "cars," interpreted to mean three kilos of cocaine, by the next day at noon. (*Id.* at 101).[4]
- On November 20, 1989, police learned that Soto was in need of one kilo of cocaine, requesting that it be delivered. (*Id.* at 101-02).
- Later that same day (November 20, 1989), Jose Soto advised Enrique Castillo that he received the cocaine and will call Castillo back because he may need three or four additional kilos. (*Id.* at 102).
- On November 21, 1989, police learned that Jose Soto called Enrique Castillo to inform him that instead of the half they had discussed, he only needed a quarter; Castillo informed Soto that it would be available in an hour. (*Id.* at 102-03).[5]

Respondents Castillo and Thomas had identified 21 East Southgate as the address from which Jose Soto's telephone calls originated by reference to a "subscriber list." (*Id.* at 81-82). Although police did not physically examine any telephone bills from U. S. West, the information contained in the computer-generated "subscriber list" was provided to the police from the local telephone company. (Tr. 3/17/93 at 97-98; Ex. 38).

In addition to the monitoring of telephone calls involving Jose Soto originating from 21 East Southgate, Phoenix police also conducted two surveillances during which

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[4] Many of the calls involved drug parlance among the suspects, interpreted by police officers knowledgeable in the use and meaning of such terms. Petitioners have never disputed the accuracy of the police officers' interpretation of these terms.

[5] In addition to these six telephone calls which originated from Jose Soto's residence, Officers Castillo and Thomas also included information in the affidavit regarding the other telephone calls involving Jose Soto which did not involve the 21 East Southgate address. The telephone calls involving Jose Soto pertained to telephone number 268-1935. (Tr. 3/17/93 at 81).

they observed drug suspects visiting the property at or near 21 East Southgate. (*Id.* at 82, 93-94). The surveillances were as follows:

On November 20, 1989, Phoenix police observed Cachettes park his car in front of 21 East Southgate; Phoenix Police Officer Geske drove by and observed Cachettes talking with a female next to the front fence at 21 East Southgate. (Tr. 3/16/93 at 65-69; Ex. Nos. 4, 5). Officer Geske then oserved Cachettes walk across the street to 20 East Southgate, where he met a large Mexican male with a moustache. (*Id*; *see also* Tr. 3/17/93 at 117-120).

On November 21, 1989, police monitored a telephone call between Jose Soto and Cachettes suggesting that Soto needed cocaine. (*Id.* at 112). Following that call, Cachettes called his brother, Ramon Ochoa, who Cachettes used as his runner. (*Id.* at 109, 112). During his telephone call, Cachettes told Ochoa that "Wedo" (aka Jose Soto) needed a certain amount. (*Id.* at 112).

Police then observed Ramon Ochoa get into his car at a different location and drive to the area of 21 East Southgate. (*Id.*). At or near that location, Officer Norlin observed Ochoa enter the rear alley at 21 East Southgate. (*Id.* at 112-13). Although Officer Norlin lost track of Ochoa somewhere in the alley and did not personally observe him deliver cocaine to Jose Soto at that particular address, police monitored a subsequent telephone call minutes later (10:36 p.m.) during which Soto advised Cachettes that he would have to show cocaine to the customer tomorrow and that he would call Cachettes thereafter. (*Id.* at 113). This telephone call occurred after Cachettes had dialed a pager identified to be Jose Soto's pager. (*Id*).

Police subsequently monitored a telephone call originating from 21 East Southgate during which Soto advised Cachettes that the customer did not like the quality of the

cocaine, and that Soto had the cocaine "there" with him. (*Id.* at 113-14). The next telephone call was made the day after Ramon Ochoa drove back into the alley behind 21 East Southgate. (*Id.* at 114).

B. Execution of Search Warrant; After-Acquired Information

On December 4, 1989 at 4:30 p.m., Maricopa County Superior Court Judge Thomas O'Toole signed the search warrant which authorized a search of the premises located at 21 East Southgate. (Tr. 3/15/93 at 47; Ex. 7—App. 9a-11a).

On the morning of December 5, 1989, Phoenix police served 22 search warrants related to the subject drug operation. (Tr. 3/17/93 at 86). When applying for and executing the search warrants, urgency was necessary because narcotics police were fully aware that drug dealers rarely "sit" on large sums of drugs or money. (Tr. 3/16/93 at 55; 3/17/93 at 83, 117). Another concern of police was that the suspected dealers, illegal aliens, would attempt to flee to Mexico. (*Id.* at 83, 121-22). Because police had been authorized to search 22 different locations as part of this large-scale drug investigation, they also were required to coordinate manpower to serve warrants on all 22 locations at the same time, rather than on a piecemeal basis which would have alerted the suspected drug dealers. (*Id.* at 83-84).

Phoenix police officers who actually served the warrants considered execution of the warrant to be high risk, because the search and seizure of all narcotics frequently involve weapons held by the drug dealers. (Tr. 3/15/93 at 168). When serving the search warrant on the Hernandez residence at 21 East Southgate, Spanish-speaking Police Officer Garza explained the purpose of the search to the occupants of the residence. (Tr. 3/16/93 at 11). It took police approximately 15 minutes to discover that there were occupants in a rear structure of the premises.

(*Id.* at 9). While searching the Hernandez residence, however, police found miscellaneous papers addressed to Jose Soto, as well at AT&T credit cards and telephone bills addressed to Jose Soto. (Tr. 3/17/93 at 44-45).

After discovering there were occupants in a rear structure, police officers made entry into the rear structure. (Tr. 3/15/93 at 134-37). Although Soto was not present in the rear structure, police found and seized more than $50,000 in cash and approximately 250 pounds of marijuana. (*Id.* at 145; Tr. 3/16/93 at 23, 232-33; Tr. 3/15/93 at 12). It is undisputed that Jose Soto was subsequently arrested and entered into a plea agreement as a result of his role in the drug operation. (Tr. 3/16/93 at 232-33; Tr. 3/17/93 at 119).[6]

Although there are small mailboxes for each structure at 21 East Southgate, Mr. Hernandez admitted that even the United States postal worker sometimes delivered Jose Soto's mail to the front house. (Tr. 3/16/93 at 201; Tr. 3/17/93 at 44-45).[7] Jose Soto's own mother had, on one occasion, come to the front structure of the premises looking for her son, and was told that he lived "in the back." (*Id.* at 216). Soto's friends made similar inquiries by knocking on the front door of the Hernandez house. (*Id.* at 207).

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[6] Petitioners claimed they did not realize the tenants in the rear structure of their property had been dealing drugs; Mrs. Hernandez was upset to learn that $50,000 in cash had been discovered because Jose Soto had been late in his rent payments. (Tr. 3/16/93 at 16, 23).

[7] The "small" mail box for the rear structure is apparently located not on the street side of the property, but near the rear structure itself. (Tr. 3/16/93 at 201). Mr. Hernandez also acknowledged that the rear structure is not visible from the street in front of his house. (Tr. 3/16/93 at 215).

C. Trial Court Proceedings

Petitioners (Gladys, Celedoneo, Antonio, Jesus, and Samuel Hernandez) filed this civil action September 23, 1991, naming as Defendants Respondents, the City of Phoenix, its police chief, and several officers who were involved in executing the warrant. The Complaint asserted claims under 42 U.S.C. § 1983 (and other civil rights statutes), asault and battery, false arrest, false imprisonment, and gross negligence.

Respondents' motion for partial summary judgment based on the officers' entitlement to qualified immunity was denied. On February 8, 1993, trial began. Respondents' motion for a directed verdict on the issue of § 1983 liability and qualified immunity was denied. On February 12, 1993, the jury returned a verdict in favor of all Defendants on all counts with the exception of the Section 1983 claim against Respondents. A mistrial was therefore declared on those counts as to Respondents.

A second trial began March 15, 1993, solely against Respondents based on their application for a search warrant. Respondents again unsuccessfully moved for a directed verdict based on their entitlement to qualified immunity. On March 18, 1993, the jury returned its verdict in favor of Petitioners in the amount of $17,500. Petitioners were later awarded attorney's fees and costs in the amount of $51,815.46.

D. Arizona Court of Appeals' Decision

Relying principally on this Court's decisions in *Hunter v. Bryant*, 112 S.Ct. 534 (1991), and *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986), the Arizona Court of Appeals, Division Two, reversed, holding the two police officers entitled to qualified immunity. Specifically, the court held that under the circumstances of this case, "reasonably competent officers would conclude that a warrant should issue, or at best, officers of reasonable competence could disagree on this issue. . . ." App. 8a,

citing *Malley*, 475 U.S. at 343, 341, 106 S.Ct. at 1097. The court emphasized that "[w]hile it is apparent with the benefit of hindsight that a 'more diligent investigation' would have revealed that Soto occupied only the rear structure, on the facts that Castillo and Thomas possessed at the time they swore out the affidavit to secure the warrant, probable cause existed to search the premises." was denied by the Arizona Supreme Court on May 25, App. 7a. Petitioners' subsequent Petition for Review was denied by the Arizona Supreme Court on May 25, 1995.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE PETITION FAILS TO COMPLY WITH SUPREME COURT RULE 14

The failure of a petitioner to "present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration" is deemed "a sufficient reason for denying the petition." *See* Rule 14.5, Rules of the Supreme Court. The Petition before this Court is neither accurate nor clear, and bears little resemblance to the type of petition required by Rule 14.

First, the Question Presented is argumentative and biased, contrary to the provisions of Rule 14.1(a). The inflammatory query posed by Petitioners compels an obvious response, yet the reader is forced to look *elsewhere* to find the true nature of the question and the factual context in which it arises. *Compare* Rule 14.1(a) (question presented should be "expressed in the terms and circumstances of the case, but without unnecessary detail").

Second, the Petition omits any specific constitutional provision under Rule 14.1(f). Although the Petition cites "42 U.S.C. 1983" as the statute involved, this civil rights statute encompasses any number of constitutional provisions because it is merely the procedural vehicle by which constitutional rights are vindicated. *Chapman v.*

Houston Welfare Rights Org., 441 U.S. 600, 617, 99 S.Ct. 1905, 1916 (1979) ("one cannot go into court and claim a violation of 1983—for 1983 by itself does not protect anyone against anything.") As this Brief emphasizes, the constitutional provision involved in this case is the "particularity" clause of the Fourth Amendment.

Third, the Petition ignores the requirements of Rules 14.1(g) and (h) by failing to include the facts material to a consideration of the question presented and supporting references to the record. The "statement" fails to include any material facts, opting to lay out an obscure procedural history of this case in the trial court. This omission is particularly troublesome given Petitioners' implicit promise to *show* this Court—by their question presented—the type of *evidence* indicating that the police officers *lied* on their search warrant application.[8] The absence of any references to the record only highlights this defect.

Finally, the Petition fails to supply this Court with any cogent reasons why certiorari should be granted. The Petition neither identifies conflicting circuit or state court decisions in need of resolution, nor attempts to argue the absence of Supreme Court precedent involving qualified immunity. Instead, the Petition relies primarily on a single *Arizona* decision, *State v. Buccini*, 167 Ariz. 550, 810 P.2d 178 (1991), which involves neither qualified

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[8] It is one thing for police officers to be factually (and innocently) mistaken about the residence of a drug dealer renting a structure positioned behind a house at a specific address. It is quite another to accuse those officers of *deliberately deceiving* a magistrate into issuing the warrant. Not only does the Petition fail to make any attempt to show the type of evidence that would permit a court to conclude that deliberate falsehoods were submitted, the Petition does not even point to any evidence suggesting a factual mistake was made by the officers. *See, e.g.*, Petition at 8 ("Plaintiffs presented evidence that each of the above statements were [sic] untrue and unsubstantial.")

immunity nor the standard by which its application is determined by courts.

II. THE WRIT SHOULD BE DENIED BECAUSE ONLY QUESTIONS OF EVIDENCE ARE INVOLVED

The Petition is nothing more than a challenge to the sufficiency of the evidence. Such an evidentiary challenge, of course, is a poor basis upon which to seek the exercise of this Court's highly discretionary review power. That a litigant feels he has sufficient evidence to withstand summary judgment in a qualified immunity case —yet is unable to convince the state appellate courts of this view—hardly justifies pursuit of a writ of certiorari from this Court.

Not only is Petitioners' sufficiency-of-the-evidence challenge contrary to the provisions of Rule 10.1, the challenge is factually baseless. As found by the Arizona Court of Appeals, the "objective facts" available to Officers Castillo and Thomas at the time of their search warrant application suggested no distinction between the residence of Jose Soto and the property located at 21 East Southgate. Castillo and Thomas had learned that no fewer than six calls involving drug negotiations originated from the home at 21 East Southgate. Phoenix police officers had further witnessed the delivery of cocaine at or near the residence of 21 East Southgate on November 21, 1989.[9] Surveillance further revealed that Enrique Castillo, a known narcotics trafficker, drove to 21 East Southgate and conversed with a woman in front of the home.[10] The

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[9] This delivery of cocaine, while not actually seen by the officers, was verified by tap-and-trace information secured between November 21 and 22, 1989.

[10] Because police suspected Jose Soto to occupy the only structure immediately visible at 21 East Southgate, they did not have the luxury of making the time-consuming inspection of the premises (demanded by Petitioners) to determine whether there was a rear structure where a tenant such as Mr. Soto could have resided. (Tr. 3/16/93 at 94-97; Tr. 3/17/93 at 87).

objective reasonableness of Respondents' belief that Jose Soto resided at 21 East Southgate was further established by the behavior of Jose Soto's mother, friends, and the U.S. postal worker, who similarly searched for Jose Soto by approaching the front house visible from the street. (Tr. 3/16/93 at 201, 207, and 216).

III. THE WRIT SHOULD BE DENIED BECAUSE SUPREME COURT PRECEDENT CONTROLS THIS CASE

Certiorari is unnecessary because previous decisions from this Court already control determination of the issues involved. The "particularity" requirement of the Fourth Amendment—in the specific context of multiple-occupancy residences—has previously been the subject of decisions in *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013 (1987), and *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990). Both the *Garrison* and *Rodriguez* decisions hold that the validity of a search warrant depends on the "objective reasonableness" of the officer's belief concerning the scope of the premises to be searched, judged *without* the benefit of 20/20 hindsight. *See Garrison*, 480 U.S. at 86, 107 S.Ct. at 1017 (factually mistaken description of building's floor plan did not invalidate warrant where description was objectively reasonable); and *Rodriguez*, 110 S.Ct. at 2799 (constitutional validity of search often "depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable").[11]

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[11] The circuit courts have similarly upheld seizures of evidence against Fourth Amendment challenges where the police officers' failures to distinguish between multiple occupancies of a single address were understandable, albeit factually mistaken. *See generally United States v. Logan*, 998 F.2d 1025, 1031-32 (D.C. Cir. 1993) (officers had no reason to suspect that the house was not a single-family residence when applying for warrant—no signs advertising rooms for rent, no rows of mailboxes, no multiple listing

Moreover, this Court has already addressed the application of qualified immunity in the context of search warrant applications in *Malley v. Briggs*, 475 U.S. 353, 106 S.Ct. 1092 (1986). *Malley* specifically holds that qualified immunity is lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45, 106 S.Ct. at 1098. The *Malley* court further emphasized that qualified immunity is required "if officers of reasonable competence could disagree" on the validity of the warrant application. *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096.

This Court's earlier decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), also provides

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of names at the front door); *United States v. Sherrell*, 979 F.2d 1315, 1317-18 (8th Cir. 1992) (alleged omission of information that three separate residences existed on property to be searched did not vitiate search warrant affidavits); *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (no Fourth Amendment violation where there was no evidence that widow's apartment was a separate structure, had a different address or possessed any other attribute which might make it a distinct home); *United States v. Pallais*, 921 F.2d 684, 691 (7th Cir. 1990) (search of defendant's residence was authorized pursuant to search warrant where residence was lot with house and garage on it, even though defendant was living in apartment above garage while house was being renovated); *United States v. Gahagan*, 865 F.2d 1490, 1496-97 (6th Cir. 1989) (search of cabin was proper, although search warrant did not include address of that particular cabin); *United States v. Hinds*, 856 F.2d 438, 441 (1st Cir. 1988) (search of fourth floor dwelling, described in search warrant as single-family, three-story building, was not beyond scope of warrant even though fourth floor was occupied by family not named in warrant); *United States v. Butler*, 793 F.2d 951, 952 (8th Cir. 1986) (search warrant for paramilitary organization's compound as a whole was valid as to the defendant's individual residence within the compound; entire premises were suspect); and *Marvin v. United States*, 732 F.2d 669, 673 (8th Cir. 1984) (search warrant upheld where agents had no reason to believe that the clinic contained apartments or private homes in which someone other than defendants resided).

ample guidance on the application of qualified immunity to a case involving a *warrantless* wiretap. The *Mitchell* court held the Attorney General entitled to qualified immunity from suit based on his authorization of a warrantless electronic surveillance which intercepted plaintiff's telephone conversations. Because the authorization was made *before* this Court had declared warrantless wiretaps illegal in *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125 (1972), and because there existed uncertainty concerning the legitimacy of warrantless wiretapping during the period of authorization, the lawfulness of the Attorney General's decision to authorize the wiretap was held to be a debatable one entitling him to qualified immunity. *Mitchell*, 472 U.S. at 534-35, 105 S.Ct. at 2820.[12]

If there remained any lingering doubts concerning the proper application of qualified immunity following *Malley* and *Mitchell*, they were eliminated by this Court's

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[12] Petitioners contend that the Arizona Court of Appeals misinterpreted the *Mitchell* decision when it stated that a trial court's denial of qualified immunity will be affirmed if "even under the defendants' version of the facts, their conduct violated law that was clearly established at the time". App. 5a. Respondents agree that this lone sentence in the Memorandum Decision miscontrues some language in *Mitchell* characterizing the denial of qualified immunity as immediately appealable under the collateral order doctrine. *Mitchell*, 472 U.S. at 527-28, 105 S.Ct. at 2816. The statement appeared in *Mitchell* because *both sides* had filed cross-motions for summary judgment regarding the applicability of qualified immunity. *Id.* at 515, 105 S.Ct. at 2809-10. Petitioners' mention of this single-sentence misconstruction of *Mitchell* dictum—which was specifically raised in Petitioners' unsuccessful Petition to Review to the Arizona Supreme Court—is an academic exercise because Petitioners have failed to supply this Court with any facts contradicting the undisputed evidence gathered by police during their trap-and-trace and surveillance investigation. Such an omission undermines Petitioners' criticism of the Arizona Court of Appeals' Decision and is fatal to their Petition.

subsequent qualified immunity decisions in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987), and *Hunter v. Bryant*, 112 S.Ct. 534 (1991).[13] There exists no need to reexamine the application of qualified immunity to a factual setting which Petitioners have not even bothered to provide this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. MASTERSON
DAVID C. LEWIS
Counsel of Record
JONES, SKELTON & HOCHULI
2901 N. Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1700
Attorneys for Respondents Thomas and Castillo

October 23, 1995

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[13] In 1992, this Court denied certiorari (with three Justices dissenting) in a similar case involving whether a police detective's factually mistaken description in a search warrant was nonetheless entitled to qualified immunity. *See McCleary v. Navarro*, 112 S.Ct. 324 (1992) (*memorandum* decision). Because the Ninth Circuit "did not have the benefit of our decision in *Hunter* when it was deciding this case," the three dissenting Justices would have summarily reversed and remanded to enable the Ninth Circuit to reexamine its decision in light of the correct legal standards. 112 S.Ct. at 2325. Unlike the Ninth Circuit in *McCleary*, the Arizona Court of Appeals in this case applied both the *Hunter* and *Malley* decisions in holding the police officers entitled to qualified immunity because reasonably competent officers *could* disagree on the lawfulness of the warrant application.

APPENDICES

APPENDIX A

[Filed Sep. 27, 1994]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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2 CA-CV 94-0131
Department B

GLADYS HERNANDEZ, CELEDONEO HERNANDEZ, individually, as husband and wife and as parents and next friends of ANTONIO HERNANDEZ, JESUS HERNANDEZ and SAMUEL HERNANDEZ, minor children,
Plaintiffs/Appellees,

v.

JAMES THOMAS and OSCAR CASTILLO,
Defendants/Appellants.

Appeal from the Superior Court of Maricopa County
Cause No. CV 91-22341
Honorable Marilyn A. Riddel, Judge

MEMORANDUM DECISION

ESPINOSA, Presiding Judge.

Defendants/appellants Oscar Castillo and James Thomas, detectives with the Phoenix Police Department, appeal from a jury verdict in favor of plaintiffs/appellees

Gladys and Celedoneo Hernandez (the Hernandezes) on their 42 U.S.C. § 1983 claim based on a search of their home pursuant to a warrant. Castillo and Thomas contend that the trial court erred in denying their motion for directed verdict because there was probable cause to support their search warrant and they were entitled to qualified immunity. We agree and reverse.

Factual and Procedural Background

As part of a large-scale narcotics trafficking investigation, Phoenix police obtained a judicial wire tap order authorizing the monitoring of telephone calls of a suspected drug dealer, Elpidio Duran. Monitored conversations led police to investigate Enrique Castillo,[1] who in turn, led them to Jose Soto, a tenant of the Hernandezes. Police were unaware that Soto rented a guest house not visible from the street on the same lot behind the Hernandezes' home and that he shared the 21 East Southgate address. Through the wire tap, police were able to ascertain the number of the telephone Soto was using. Information obtained from U.S. West Communications showed that that phone number belonged to Soto at the service address of 21 East Southgate, but did not indicate multiple dwellings at the address. Police never saw nor attempted to obtain an actual telephone bill, which would have revealed that Soto's phone number was assigned to the rear structure, nor did they check county property records, which would have indicated multiple residences on the property.

Between November 18 and November 24, 1989, police intercepted eleven conversations between Soto and Cachettes arranging the purchase of various quantities of cocaine. At least six of these calls originated from 21 East Southgate. On November 20, Cachettes was fol-

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[1] Because appellant Castillo and Enrique Castillo share the same last name, we will refer to Enrique Castillo by his alias, Cachettes.

lowed to 21 East Southgate, where he parked his car, spoke with someone in the front yard, and then crossed the street with his briefcase where he met Soto at 20 East S thgate. During a November 21 phone conversation, Soto gave Cachettes instructions to deliver cocaine to him. A surveillance officer followed Cachettes's delivery man to the vicinity of 21 East Southgate and lost sight of him in an alley behind the house. The delivery man's car was later seen parked in the alley between 21 East Southgate and the house next door. The surveillance officer did not notice that there were two structures on the property because it was dark and his view was obstructed by some bushes; however, he later returned to the area to see if he could determine exactly where the delivery man had gone and noticed the second structure. The next day Soto called Cachettes from 21 East Southgate to inform him that Soto had the cocaine.

Using this information, Castillo and Thomas secured a search warrant for 21 East Southgate as part of a larger search operation involving twenty-two other locations. On December 5, Phoenix police officers entered the Hernandez home to execute the warrant. The warrant listed the location to be searched as "21 East Southgate, single family residence of block construction, white in color, front door faces north, driveway on the east side. The house is the third structure east of Central and on the south of Southgate." The warrant did not refer to any separate structures on the property.[2] No contraband was found in the Hernandezes' home, but police discovered approximately 260 pounds of marijuana and $50,700 in cash in the guest house. No cocaine was found.

The Hernandezes sued the City of Phoenix, the Phoenix Police Department, the chief of police, and thirteen offi-

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[2] While there was testimony that the police were aware of the separate structures prior to the execution of the warrant, contrary to appellees' assertions, there is no evidence that they were aware the structures were separate residences.

cers, including Castillo and Thomas, in their official and individual capacities, asserting that their federal civil rights had been violated under § 1983 and rasing state claims for assault and battery, false arrest, false imprisonment, negligence, gross negligence, and emotional distress. In their § 1983 claim against Castillo and Thomas, the Hernandezes alleged that the officers secured the warrant "without confirming or investigating the actual location of Jose Soto's residence."

Castillo and Thomas moved for summary judgment on the civil rights violation on grounds they had acted in good faith pursuant to a search warrant supported by probable cause and were immune from civil liability because they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The trial court denied the motion. The matter proceeded to trial and the claims for assault and battery, false arrest, false imprisonment, and negligence were dismissed, as were some of the defendants. The jury returned defense verdicts on all claims, except the § 1983 claim against Castillo and Thomas, which resulted in a hung jury and a mistrial.

The matter proceeded to trial a second time. At the close of the Hernandezes' case, Castillo and Thomas moved for a directed verdict, reasserting the arguments they had advanced in their summary judgment motion. The trial court denied the motion, and the jury found in favor of the Hernandezes. The trial court later denied Castillo and Thomas's motion for judgment notwithstanding the veridct.

Standard of Review

Castillo and Thomas asserted a qualified immunity claim in their motions for summary judgment, directed verdict, and judgment notwithstanding the verdict and raise the trial court's denial of these motions as reversible

error. The Hernandezes contend that the standard of review is one of deference to the trial court's discretion. We disagree. Qualified immunity is a question of law and is distinct from the merits of the case. *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). We will affirm the trial court's denial of a claim of qualified immunity by government defendants if, even under the defendants' version of the facts, their conduct violated law that was clearly established at the time. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Henke v. Superior Court*, 161 Ariz. 96, 775 P.2d 1160 (App. 1989). On questions of law, our review is *de novo*. *City of Phoenix v. Superior Court*, 170 Ariz. Adv. Rep. 68 (Ct. App. August 4, 1994).

Qualified Immunity

The doctrine of qualified immunity shields government officials performing discretionary functions from civil liability so long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Castillo and Thomas are not entitled to immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986). The shield of immunity is lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45, 106 S. Ct. at 1098, 89 L. Ed. 2d at 281.

In denying the motion for directed verdict, the court stated, "As a trial judge, every time I hear reasonable, they should have done it, that's for a jury to determine."

However, the reasonableness of Castillo's and Thomas's actions and whether they were entitled to qualified immunity was a matter of law for the trial court to decide, not an issue of fact for the jury. *Hunter v. Bryant, supra.* In that case, the Supreme Court overruled a Ninth Circuit decision, which held that whether a reasonable officer could have believed he had probable cause was a question for the trier of fact and that summary judgment based on a lack of probable cause is proper only if there is but one reasonable conclusion a jury could reach. The Court rejected that approach, finding the question of immunity one for the trial court, not the jury. The Court ruled that the trial court "should ask whether the [defendants] acted reasonably under settled law *in the circumstances,* not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." *Hunter,* 502 U.S. at ——, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (emphasis added).

Castillo and Thomas argue that reasonable officers could have believed that the description in the search warrant affidavit was constitutionally adequate. Probable cause to issue a search warrant exists "when the facts and circumstances presented to the magistrate are based on personal knowledge or trustworthy information sufficient to warrant a person of reasonable caution to believe that seizable items are located on the premises to be searched." *State v. McCall,* 139 Ariz. 147, 156, 677 P.2d 920, 929 (1983), *cert. denied,* 467 U.S. 1220 (1984). Assessment of the validity of a warrant must be based on information that the officers disclosed or had a duty to discover and disclose to the issuing judge. *Maryland v. Garrison,* 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). Evidence that emerges after a warrant is isued has no bearing on whether or not it was validly issued. *Id.*

The Hernandezes generally and repeatedly contend that Castillo and Thomas "lied" and withheld significant infor-

mation in securing the warrant. More specifically, they assert that the officers conducted no investigation to determine Soto's residence or the occupants of 21 East Southgate, nor did they surveil the address. These assertions are not supported by the record. As a result of a valid wire tap of Cachettes's phone, police successfully procured a "tap and trace" on the phone Soto was using. Information obtained from the telephone company showed that the number belonged to Soto at 21 East Southgate, not "21 East Southgate rear." Although the Hernandezes' expert testified that his review of police records showed that no surveillance was initiated at 21 East Southgate, Officer Nordlin testified that he followed Cachettes's delivery man to that vicinity and saw his car parked behind the house. A subsequent phone call from Soto to Cachettes, originating from the same number at 21 East Southgate, confirmed the delivery of the cocaine. The officers' knowledge that Soto maintained addresses across the street at 20 East Southgate and nearby on West Riverside and their failure to include this information in the search warrant affidavit does not negate the probability that contraband could be found at 21 East Southgate.

Detective Thomas testified that someone was sent to 21 East Southgate before the warrant was executed to see what was located there. That he was unable to remember who was sent or what happened to notes describing the property is irrelevant to the validity of the warrant. Furthermore, a visual inspection of the front of the house in order to secure a description would not have revealed the existence of a separate residence in the back because it was not visible from the front. While it is apparent with the benefit of hindsight that "more diligent investigation" would have revealed that Soto occupied only the rear structure, on the facts that Castillo and Thomas possessed at the time they swore out the affidavits to secure the warrant, probable cause existed to search the premises. Qualified immunity " 'gives ample room for mistaken

judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter*, 502 U.S. at ——, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (quoting *Malley*, 475 U.S. at 343, 341, 106 S. Ct. at 1097, 1096, 89 L. Ed. 2d at 280, 278). If officials of reasonable competence could disagree on a course of conduct, that conduct should be protected. *Malley, supra.* Here, on an objective basis, reasonably competent officers would conclude that a warrant should issue, or at best, officers of reasonable competence could disagree on this issue, thus, Castillo and Thomas are entitled to qualified immunity.

The trial court's judgment in favor of the Hernandezes is reversed. As the Hernandezes are no longer prevailing parties, the award of attorney's fees and costs is vacated. 42 U.S.C. § 1988(b).

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA
Presiding Judge

CONCURRING:

/s/ William E. Druke
WILLIAM E. DRUKE
Chief Judge

/s/ James D. Hathaway
JAMES D. HATHAWAY
Judge

APPENDIX B

POLICE DEPARTMENT
CITY OF PHOENIX, ARIZONA

SEARCH WARRANT

COUNTY OF MARICOPA, STATE OF ARIZONA

Warrant No. ————————

(LOCATION B-9)

TO ANY PEACE OFFICER IN THE STATE OF ARIZONA:

Proof by affidavit having been made this day to me by DETECTIVE O. CASTILLO #3630 and DETECTIVE J. THOMAS #2276

I am satisfied that there is probable cause to believe that

[x] on the person(s) of Jose R. Soto m/m 03/14/53

[x] on the premises known as 21 East Southgate is a single family residence of block construction, white in color, front door faces north, driveway on the east side. The house is the third structure east of Central on the south side of Southgate

[x] in the vehicle(s) described as any vehicle listed on Attachment

in the City of PHOENIX, County of MARICOPA, State of Arizona, there is now being possessed or concealed certain property, persons or things described as:

1. Narcotic Drugs
2. Marijuana
3. Packaging Material and Paraphernalia
4. U.S. Currency
5. Drug Ledgers
6. Telephone Tolls and Records

7. Personal Records
8. Pagers
9. Weapons

which property, persons or things

[ ] were stolen or embezzled

[x] were used as a means for committing a public offense

[x] is (are) being possessed with the intent to use as a means of committing a public offense

[x] is (are) in possession of Jose R. Soto m/m, 03/14/53 to whom it was delivered for the purpose of concealing it or preventing it from being discovered.

[x] constitutes evidence tending to show that a public offense has been committed, or tending to show that Jose R. Soto m/m. 03/14/53 has (have) committed the offense

[ ] such person is the subject of an outstanding arrest warrant such public offense being *Conducting an Illegal Enterprise and Sale of Narcotics* which occurred on or about the ———— day of———— between October 12th and December 5, 1989, at 21 East Southgate (as previously described) Phoenix, Maricopa County, Arizona

YOU ARE THEREFORE COMMANDED

[x] in the daytime (excluding the time period between 10 PM and 6:30 AM)

[ ] or nighttime (good cause therefore having been shown)

to make a search of the above named or described person(s), premises, and vehicles for the herein above described persons, property or things, and if you find the same or any part thereof, to retain such in your custody or in the custody of the Phoenix Police Department, as provided by A.R.S. 13-3920.

Return this warrant to me within five (5) days of the date thereof, as directed by A.R.S. 13-3918.

Given under my hand and dated this 4th day of Dec. 1989.

/s/ Tom O'Toole
Judge,
Justice of the Peace or Magistrate
of Superior Court

AFFIDAVIT FOR SEARCH WARRANT
COUNTY OF MARICOPA, STATE OF ARIZONA

No. ————————

YOUR AFFIANTS, Detective James Thomas #2276 and Detective Oscar Castillo #3630, peace officers in the State of Arizona, being first duly sworn, upon oath, deposes and says:

That from October 12, 1989 through December 5, 1989, in Maricopa County, State of Arizona, the crimes of controlling an illegal enterprise, conspiracy to sell narcotic drugs, sale of narcotic drugs, conspiracy to import and transport narcotic drugs, importing and transporting narcotic drugs are being committed by three organizations involving no less than twenty-five (25) individuals who have been identified, and are conducting the business of the illegal enterprise's narcotics related transactions from twenty-two (22) locations within Maricopa County and one location in Pima County.

THAT THE AFFIANT has probable cause to believe that

(X) on the person(s) of these co-conspirators

(X) on and in the premises occupied by these co-conspirators

(X) in the vehicles operated by these co-conspirators; in the Cities of Phoenix, Tempe, Maricopa County, State of Arizona, there is now being possessed or concealed certain property, persons or things which

(X) are used as a means for committing a public offense.

(X) are being possessed with the intent to use as a means of committing a public offense.

(X) is in the possession of each co-conspirator, to whom it was delivered for the purpose of concealing it or preventing it from being discovered.

(X) constitutes any evidence tending to show that a public offense is being committed, or tending to show that the co-conspirators have committed the offense.

ITEMS TO BE SEIZED BY VIRTUE OF THE SEARCH WARRANTS

(AT EACH LOCATION MAY INCLUDE ANY OR ALL THE FOLLOWING)

1. Narcotic Drugs (Cocaine, Heroin and Marijuana)

* * * *

2. U.S. Currency

* * * *

3. Transaction Records

* * * *

4. Financial Records

* * * *

5. Telephone Records

* * * *

6. Photos, Video Recordings, Audio Recordings

* * * *

7. Drug Paraphernalia

* * * *

8. Electronic Equipment

* * * *

9. Weapons

* * * *

We, your affiants know that Jose Elpidio Duran, Enrique Ochoa Castillo and Francisco Javier Fuentes control drug distribution organizations responsible for the importation of multi-kilo quantities of cocaine, multi-ounce quantities of heroin and multi pound quantities of marijuana into Metropolitan Phoenix which is then sold to lower-level dealers for further distribution to the user.

This affidavit shall support the probable cause to issue search warrants at twenty-three (23) locations within the State of Arizona. There will be three (3) sections to the affidavit. One section for each of the separate conspiracies being controlled by Jose Elpidio Duran (Section A); Enrique Ochoa Castillo (Section B); and Francisco Javier Fuentes (Section C). Each section will specify the locations to be searched, persons to be searched and vehicles to be searched.

The previous affidavits for court ordered interpretation 106 (CWT-106) dated October 12th, 1989, October 25th, 1989, November 11th, 1989, the CWT activity reports submitted to the Judge and Affidavit in Support of Civil Seizure are hereby re-alleged in their entirety and incorporated herein by reference.

EXPERIENCE

I, Oscar Castillo, have been a police officer for ten years. The past five (5) years have been assignments dealing with narcotics enforcement. During the course of my duties I have purchased narcotics (heroin, cocaine) and marijuana on numerous occasions. I know from these experiences how importers, distributors and dealers conduct their business of drug sales. I have attended training seminars for drug identification, drug investigations, asset identification and conspiracy investigations. I have participated in six previous conspiracy investigations utilizing court ordered wire taps.

I have participated in over fifty (50) search warrants involving narcotic drugs, dangerous drugs and marijuana. Six of the warrants were multi-location simultaneous warrants involving the participants of conspiracy and illegal enterprise to distribute drugs. My responsibilities were to conduct the search, find and identify items of evidence, seize the evidence and process the items for impounding for use in court. I am thoroughly familiar with what items of evidence are to be found, and where they may be concealed by participants in drug conspiracies.

While participating in the six previous court ordered wire taps as a monitor I became thoroughly familiar with how the intercepted conversations relate to items of evidence later recovered in the search warrants. I have personally listened to every call intercepted in this investigation as it relates to the conspiracy and is referenced in this affidavit.

I have been recognized as an expert by the Superior Court of Maricopa County, Arizona and the United States Federal Court in the field of narcotics investigations.

I, James Thomas, have been a police officer for over seventeen (17) years. The past thirteen (13) years I

have been assigned to various detective investigations/ details. These include burglary, assault, auto theft, sexual assault, robbery and homicide. These assignments provided training and experience to investigate crimes, identify the suspects, gain evidence by search warrant and pursue prosecution of the suspects.

In the field of narcotics investigations I have attended six seminars specific to narcotics conspiracy investigations as well as a college course at Glendale Community College.

I have participated in eight (8) previous court ordered wire interceptions. I am thoroughly familiar with the methods and operation of an illegal enterprise and conspiracy to import, distribute and sell narcotic drugs, dangerous drugs and marijuana. In each of these eight (8) investigations I have participated in the multi-location, simultaneous search warrants. I had responsibility for searching, identifying items of evidence, securing that evidence and processing it for court purposes.

I have reviewed all intercepted calls with Oscar Castillo that are referred to in this affidavit and have personal knowledge of the corresponding surveillances and information. I know from my past experience and the information gathered during this investigation where evidence is currently being concealed and what items at those locations will constitute evidence, which will link the various co-conspirators to the illegal enterprises controlled by Jose Elpidio Duran, Enrique Ochoa Castillo and Francisco Javier Fuentes.

That said property locations, persons, vehicles, or things to be searched by virtue of search warrants are described as follows:

* * * *

Call 298: inbound to 377-2110 occurs on 11/21/89 at 2039 hours. Trap and trace did identify the origin of

the call at 268-6148. Enrique Castillo advises a whole car (kilo of cocaine) is available. Soto tells Castillo to send it over. He will contact the customer. If the customer likes the quality, he will purchase a kilo.

Call 306: inbound to 377-2110 occurs on 11/21/89 at 2236 hours. Trap and trace did not identify the origin of the call 306 Jose Soto advises Enrique Castillo he will have to show the cocaine to the customer tomorrow. He will call Castillo after that. This call occurs after Castillo dials 250-7729 and enters 377-2110 as a message.

Call 319: inbound to 377-2110 occurs 11/22/89 at 1607 hours. Trap and trace did identify the origin of the call at 268-1935. Jose Soto advises Enrique Castillo the customer did not like the quality. Soto has it there with him. If Castillo wants to wait Soto will try to sell it elsewhere. Castillo agrees to leave the cocaine with Soto.

Call 337: Inbound to 377-2110 occurs 11/24/89 at 1038 hours. Trap and trace did not identify the origin of the call 337 Jose Soto advises he sold some of the cocaine. Jose Soto asks if there is any better quality available. Enrique Castillo stated he would wait until Soto sells what Soto has before he collects the money.

We know that on November 11, 1989, Jose Soto has several pounds of marijuana for sale and seven hundred fifty dollars in his possession. He offers this to Enrique Castillo or will trade it for cocaine which is available from Castillo.

We know that on November 19, 1989, Jose Soto may need up to four kilos of cocaine for a customer or customers

We know that on November 20, 1989, Jose Soto received at least a kilo of cocaine from Enrique Castillo.

We know that on November 21, 1989, Jose Soto received at least a kilo of cocaine from Enrique Castillo.

We know that between November 21 and 24, 1989, Jose Soto was selling portions of the kilo of cocaine received from Enrique Castillo on November 21. The quality was poor and he was having problems selling it.

We know from surveillance that Ramon Ochoa delivered cocaine to Jose Soto on 11/21/89 at 21 East Southgate.

We know from Trap and trace that calls 212, 214, 231, 237, 265 and 319 originated from 268-1935 located at Jose Soto's residence, 21 East Southgate.

We know that as a kilo dealer, Jose Soto will have in his possession, items of evidence documenting his involvement in the illegal enterprise controlled by Enrique Castillo. These items will include, but not be limited to narcotic (cocaine) drug, marijuana, packaging material, paraphernalia, U.S. currency, drug ledger, telephone tolls, personal records, pager and weapons.

SECTION B

(Enrique Ochoa Castillo and Associates)

B1. 1808 North 32nd Street, Apartment #212, Phoenix, Arizona

a. Enrique Ochoa Castillo
W/M, 6-20-59
Social Security Number: 529-357-7673 and 526-45-6354 Mobile cellular phone number 377-2110, intercepted from November 8 to December 6, 1989.
Telephone number: 244-1512

B2. 1501 East Willetta, Phoenix, Arizona
Telephone Number 271-4816

a. Javier Ortiz, M/M, 3/17/60

b. Ramon Ochoa, M/M, 09/04/66

B3. 3322 East Pierce, Phoenix, Arizona
Telephone Number: 231-0725

a. Ramon Ochoa
W/M, 09/04/66

b. Javier Ortiz
W/M, 3/17/60

B4. 6826 South Jentilly, Tempe, Arizona
Telephone Number: 345-7338

a. Norma Alicia Felix Torres
W/F, Unknown D.O.B.

b. Enrique Castillo
W/M, 06/20/59

B5. 1521 West Weir, Phoenix, Arizona
Telephone Number 276-7072

a. Manuel Leal
W/M, 7-1-54

B6. 2502 North 58 Lane, Phoenix, Arizona
Telephone Number 247-1283

a. Alvaro Garcia, M/M

B7. Mountain Ranch Realty, 5400 South Central, Phoenix, Arizona
Telephone Number 268-3427

a. Robert Chacon
W/M, 10-6-50

B8. 3258 East 25th Street, Tucson, Arizona
Telephone: 327-4365

a. Jose Florencio Urias
W/M, 9-5-66

B9. 21 East Southgate, Phoenix, Arizona
Telephone Number 268-1935

a. Jose Soto, W/M, 3/14/53

* * * *

LOCATION B-9

21 East Southgate, Phoenix, Arizona is a single family residence of block construction white with white trim facing north. The telephone number 268-1935 is subscribed to by Jose R. Soto. Black mail box in the front yard with the numbers 21 on the box.

This residence is occupied by Jose R. Soto AKA "Wedo." Soto is purchasing up to kilo quantities of cocaine on a regular basis from Enrique Ochoa Castillo for further distribution in Phoenix. Between November 18, 1989 and November 24, 1989, Jose Soto has been intercepted in eleven conversations with Enrique Castillo arranging the purchase of varying quantities of cocaine. The following is a summary of these eleven conversations and related surveillances which document events related to the calls.

Call 6: inbound to 377-2110 is identified by trap and trace as originating from 268-1935 on 11/11/89 at 1652 hours. Jose Soto inquires of Castillo if any is available. Castillo stated, yes and the price is sixteen and a half (kilo price for cocaine), and the quality is pretty good. Soto states he has the other that is real good. The normal price is eight fifty to nine, but Soto will sell it to Castillo for seven fifty (pound price for marijuana).

Call 77: inbound to 377-2110 is not identified by trap and trace as origination location on 11/12/89 at 1413 hours. Jose Soto inquires of Castillo if drugs are available. Castillo stated, yes, that he will need the money. Jose Soto stated he would have to pay later (get the cocaine on a front).

Call 212: inbound to 377-2110 is identified by trap and trace as originating from 268-1935 on 11/19/89 at 1450 hours. Jose Soto inquires of Castillo if any cocaine is available. Castillo states, yes and the price is fifteen and a half (kilo price for cocaine). Jose will call Castillo later to confirm a sale.

Call 214: inbound to 377-2110 is identified by trap and trace as originating from 268-1935 on 11/19/89 at 1543 hours. Jose Soto stated he needed three cars (kilos of cocaine) for tomorrow around noon.

Call 231: inbound to 377-2110. The origin of the call is Jose Soto's and identified by trap and trace is 268-1932 on 11/20/89 at 1135 hours, however, just prior to the call, Enrique Castillo had dialed pager 250-7729 and entered 377-2110 as a message. This pager is leased from Paging Network by Jose R. Soto listing Soto's Seafood Restaurant as his business. Jose Soto advises he needs one girl (kilo of cocaine). He wants it on a front and will show it to the customer at his house. If they like it, they will pay for it right then. Enrique Castillo agrees to meet with Soto there in one hour.

Call 237: inbound to 377-2110 occurs on 11/20/89 at 1321 hours after Enrique Castillo dials 250-7729 and enters 377-2110 as a message. Trap and trace did identify the origin of the call at 268-1935. Jose Soto advises he got the cocaine. He will call Castillo back as he may need another three or four.

Call 265: inbound to 377-2110 occurs on 11/21/89 at 1106 hours. Trap and trace did identify the origin of the call at 268-1935. Jose Soto stated instead of the half they had discussed, he only needed a quarter. Enrique Castillo stated it would be available in an hour.

Call 293: inbound to 377-2110 occurs on 11/21/89 at 2014 hours. Trap and trace did identify the origin of the call at 243-6148. Jose Soto wants a half gallon of paint (quantity of cocaine). Enrique Castillo tells Soto to call back in ten minutes because he will have to check with his brother.

Call 295: Enrique Castillo tells that "Wedo" (Jose Soto) wants a half a Volkswagon.